



February 23, 2000

Ms. Ruth H. Soucy
Manager, Open Records Division
Comptroller of Public Accounts
P O Box 13528
Austin, Texas 78711-3528

OR2000-0658

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132380.

The Comptroller of Public Accounts (the "comptroller") received two requests related to the Mainframe Processor Replacement Request for Offer, RFO #110599. One request was for copies of all documents used in the evaluation and selection of vendors, the other for the equipment bid under all options and the financial information associated with each bid, specifically excluding any proprietary information. The comptroller does not argue that the information requested is excepted from disclosure. You have notified the third parties whose interests are at issue, in accordance with section 552.305 of the Government Code, in order to allow them to establish the applicability of an exception to disclosure should any or all of them seek to protect the information from public disclosure. *See* Open Records Decision No. 542 (1990).

As Amdahl Corporation did not respond to the notification, we conclude that Amdahl's request for offer information is not excepted from disclosure based on section 552.110. The comptroller must release Amdahl's information. While we received arguments for ViON, ViON does not identify a claimed exception to disclosure, nor does it provide any specific factual evidence explaining why the requested information should not be released. Therefore, we have no basis to conclude that ViON's responsive information is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial

competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The comptroller must release ViON's information.

IBM did submit arguments asserting that portions of the information are excepted from disclosure based on section 552.110 of the Government Code. Section 552.110 excepts from required disclosure:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from [required public disclosure].

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A "trade secret":

may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

The determination of whether any particular information is a trade secret is a determination of fact.¹ Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

¹Open Records Decision No. 552 at 2 (1990).

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's business];
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; [and]
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a prima facie case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.³

We have reviewed the arguments made by IBM. We believe that IBM has made a prima facie case that the information it seeks to withhold is excepted from required public disclosure under section 552.110. The comptroller may not release that information.

In summary, the comptroller must release the requested information regarding ViON and Amdahl. The comptroller must withhold the information IBM seeks to withhold, but must release the remainder of the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

²RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed).

³Open Records Decision No. 552 at 5 (1990).

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 132380

Encl. Submitted documents

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